K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — APPEAL NO W-02-17 OF 1994
DENIS ONG, MOHD SAARI AND ALAUDDIN JJCA
19 MAY 2003

Companies and Corporations *— Liquidation — Proof of debt — Whether creditors had to show proof of debt*

Companies and Corporations *— Winding Up — Liquidators — Liquidtor obtained order to acquire accounts, documents, ledgers and monies and other valuables — Order set aside — Whether Court of Appeal had jurisdiction to grant order*

On 17 November 1982, Kosmopolitan Credit & Leasing Sdn Bhd ('KCL') created a debenture in favour of Koperasi Serbaguna Kosmopolitan Bhd ('Koperasi'). Subsequently the rights were assigned to Kewangan Utama Malaysia Bhd ('KUMB'). On 8 February 1991, the second respondent was appointed by the secured creditor as a receiver and manager ('R and M') pursuant to the terms of the debenture. On 16 May 1991, the High Court ordered the winding up of KCL under s 218 of the Companies Act 1965 ('the Act') and the appellant was appointed as the liquidator. KUMB was subsequently acquired by the first respondent. On 30 September 1993, the appellant ('liquidator') obained various ex parte orders which were set aside on 8 July 1994. The liquidator appealed against the order of setting aside and prayed for an acquiring order to acquire the accounts, documents, ledgers and monies and other valuables and that all creditors prove their debts, among other reliefs. The question is whether this court had the jurisdiction to grant the order.

Held, dismissing the appeal with costs here and in the court below:

(1) It is settled law that movable assets which form the subject matter of a debenture are recognized as equitable charge. In the light of *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in Liquidation)* [1995] 2 MLJ 600 and *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, the court was of the view that the company was not prima facie entitled to the moveable asset (see p 214G–H); *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in Liquidation)* [1995] 2 MLJ 600 and *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 followed.

(2) The debenture in the present case was registered under s 108 of the Act, meaning that the first respondent as debenture holder was a charger of equitable charge. Assuming KCL was not in liquidation, it was incumbent upon KCL to redeem it before the

R and M could be compelled to hand over the movable asset to KCL. The R and M could not be compelled to hand over the movable asset to the liquidator. KCL was only entitled to the equity of redemption and it followed, therefore, that the liquidator was only entitled to exercise his right of redemption (see pp 214I–215B). A

(3) A secured creditor is not obliged to submit proof of debt and could rely on his security by virtue of s 291(1) and (2) of the Act and sch C (s 42) of the Bankruptcy Act 1967. The combined effect of the above provisions is that a secured creditor may submit proof of debt and if he does, he will be entitled to a dividend in respect of the unsecured portion. If the secured creditor does not submit proof of debt then pursuant to item 16 of sch C of the Bankruptcy Act 1967 the secured creditor shall be excluded from participating in a dividend (see p 215C–D). B C

[Bahasa Malaysia summary D

Pada 17 November 1982, Kosmopolitan Credit & Leasing Sdn Bhd ('KCL') telah membuat satu debentur untuk Koperasi Serbaguna Kosmopolitan Bhd ('Koperasi'). Kemudiannya, hak-hak telah serahhak kepada Kewangan Utama Malaysia Bhd ('KUMB'). Pada 8 Februari 1991, responden kedua telah dilantik oleh si piutang bercagar sebagai penerima dan pengurus ('P dan P') menurut terma-terma debentur. Pada 16 Mei 1991, Mahkamah Tinggi telah memerintah penggulungan KCL di bawah s 218 Akta Syarikat 1965 ('Akta tersebut') dan perayu telah dilantik sebagai penyelesai. KUMB kemudian telah diperoleh responden pertama. Pada 30 September 1993, perayu ('penyelesai') telah mendapat beberapa perintah ex parte yang telah diketepikan pada 8 Julai 1994. Penyelesai telah merayu terhadap perintah pengenepian dan telah memohon satu perintah perolehan untuk memperoleh akaun-akaun, dokumen-dokumen, lejar-lejar dan wang dan untuk semua si piutang membuktikan hutang-hutang, antara relif-relif lain. Persoalan adalah sama ada mahkamah ini mempunyai bidang kuasa untuk memberi perintah itu. E F G

Diputuskan, menolak rayuan dengan kos di mahkamah ini dan di mahkamah di bawah: H

(1) Ia merupakan undang-undang lapuk bahawa aset-aset alih yang menjadi perkara subjek debentur dikenali sebagai gadaian ekuiti. Memandangkan kes-kes *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in Liquidation)* [1995] 2 MLJ 600 dan *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, mahkamah berpendapat bahawa syarikat itu tidak prima facie berhak kepada aset alih itu (lihat ms 214G–H); *Director of Customs, Federal Territory v Ler Cheng Chye* I

(Liquidator of Castwell Sdn Bhd, in Liquidation) [1995] 2 MLJ 600 dan *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 diikut.

(2) Debentur di dalam kes ini telah didaftarkan di bawah s 108 Akta tersebut, dan ini bermakna bahawa responden pertama sebagai pemegang debentur adalah penggadai gadaian ekuiti itu. Jikalau KCL tidak di dalam likuidasi, ia menjadi kewajipan KCL untuk menebus sebelum P dan P boleh dapat dipaksa untuk memberi aset alih kepada KCL. P dan P tidak boleh dipaksa untuk memberi aset alih kepada penyelesai. KCL hanya berhak kepada ekuiti penebusan dan oleh itu peneyelesai hanya dapat menggunakan hak penebusannya (lihat ms 214I–215B).

(3) Si piutang bercagar tidak perlu memberi bukti hutang dan boleh bergantung kepada cagarannya melalui s 291(1) dan (2) Akta tersebut dan jadual C (s 42) Akta Kebankrapan 1967. Gabungan kesan peruntukan-peruntukan itu adalah si piutang bercagar dapat memberi bukti hutang dan jikalau beliau berbuat begitu beliau akan berhak mendapat dividen berkenaan bahagian yang tidak bercagar. Jikalau si piutang tidak memberi bukti hutang maka menurut butir 16 jadual C Akta Kebankrapan 1967 si piutang bercagar tidak dapat mendapat dividen (lihat ms 215C–D).

Notes

For cases on liquidators, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue), paras 917–945.

For cases on proof of debt, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue), para 311.

Cases referred to

B Johnson & Co (Builders), Ltd, Re [1955] 2 All ER 775 (refd)

Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in Liquidation) [1995] 2 MLJ 600 (folld)

Downsview Nominees Ltd and another v First City Corp Ltd and another [1993] 3 All ER 626 (refd)

High Crest Motors Pte Ltd (in Liq), Re [1978] 3 ACLR 888 (refd)

Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (distd)

Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 (folld)

Sowman v David Samuel Trust Ltd [1978] 1 All ER 616 (refd)

Legislation referred to

Bankruptcy Act 1967 s 42, sch C, items 9, 10, 11, 16

Companies Act 1965 ss 4(1)(b), 108, 218, 233(1), 247(1), 252, 277(5), 291(1), (2), 300

Companies Act 1961 [Aus] s 263(3)
National Land Code

Appeal from: Penggulungan Syarikat No D1–28–396–90 (High Court, Kuala Lumpur)

Shahrul Hameed Amirudin (*Woo Lai Mei* with him) (*Zul Rafique & Partners*) for the appellant.

Mohamed Ariff bin Md Yusof (*Aliza Hilyati Wan Haron* with him) (*Cheang & Ariff*) for the first respondent.

Izabela DeSilva (*Iza Ng Yeoh & Kit*) for the second respondent.

Mohd Saari JCA (delivering judgment of the court) : On 30 September 1993, the appellant ('liquidator') obtained various ex parte orders which were subsequently set aside on 8 July 1994. Reliefs prayed for by the liquidator in the court below are as follows:

(1) (not applicable);

(2) commence legal proceedings against MBf Finance Bhd ('MBf') for the return of RM4m and a further RM5.75m;

(3) give notice to all creditors including secured creditors to prove their debts;

(4) acquire from the receivers and managers ('R and M') inter alia, the accounts, documents, ledgers and monies and other valuables ('the acquiring order');

(5) transfer Originating Summons No D6–24–018–92 to this court.

Against the order of setting aside, the liquidator appeals.

Antecedent facts

On 17 November 1982, Kosmopolitan Credit & Leasing Sdn Bhd ('KCL') created a debenture ('the debenture') in favour of a co-operative society known as Koperasi Serbaguna Kosmopolitan Bhd ('Koperasi').

Subsequently, the rights under the debenture were assigned by Koperasi to Kewangan Utama Malaysia Bhd ('KUMB') by virtue of a deed of assignment dated 16 November 1990.

On 8 February 1991, the second respondent was appointed by the secured creditor as R and M pursuant to the terms of the debenture.

On 16 May 1991, on a petition presented by a creditor under s 218 of the Companies Act 1965 ('the Act'), the High Court ordered the winding up of KCL and appointed the appellant as the liquidator.

KUMB was subsequently acquired by the first respondent. By virtue of a vesting order dated 30 October 1991, all the rights and liabilities of KUMB became vested in the first respondent.

Subsequently, on 14 May 1992, the liquidator, filed Originating Summons No D6–24–98–92 seeking, inter alia, a declaration that the debenture was null and void. This matter has yet to be determined by the High Court.

A The central issue for determination is whether the court has jurisdiction to grant the acquiring order.

Excerpts from the judgment of the Federal Court in *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 at pp 826–827 reads:

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> The position in this country is different. Because a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument is by definition (see s 4(1)(b) of the Act) an officer of the corporation — and all officers of a corporation, whether past or present, are obliged under pain of prosecution under s 300(1) of the Act [Companies Act 1965], to deliver up to the liquidator appointed by the court or as he directs:
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> (i) all the moveable and immovable property of the corporation in his custody or under his control; or
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> (ii) all books and papers in his custody or control belonging to the corporation, being by law required to deliver up the same (see s 300(1)(b)(i) and (ii)) — the clear implication is that liquidation does not merely terminate the agency of a receiver and manager but also his powers on winding up, since there is no estate for the receiver and manager to administer.
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For the liquidator, it is submitted that the present case is on all fours with *Kimlin*. With greatest respect, we disagree. We are of the view that *Kimlin* is distinguishable from the present case on the following grounds:

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(i) the present case is concerned with an application by the liquidator for an acquiring order in respect of movable asset pursuant to s 233(1) and s 277(5) of the Act; whereas, *Kimlin* is concerned with statutory charge of land under National Land Code; ('NLC')

F (ii) in *Kimlin*, it was an application for leave to sell lands which were subject to the charge, without taking proceedings under the NLC to obtain judicial sale. In that case, the Federal Court held that *Sowman v David Samuel Trust Ltd* [1978] 1 All ER 616 had no application to charged land under the NLC. But the Federal Court made no mention that *Sowman* had no application to movable property;

G (iii) s 277(5) which is relevant to the present case was not considered in *Kimlin*. Interpretation of s 263(3) of the Companies Act 1961 (in para materia with our s 277(5)) was discussed in *Re High Crest Motors Pte Ltd (in Liq)* [1978] 3 ACLR 888;

(iv) *Kimlin* speaks about s 300 which is a penal section and s 4(1)(b). Our H view is that the statutory provisions in the aforesaid section are qualified by s 233(1) and s 277(5). It is noted that under s 300, the R and M is required to hand over the asset of the company to the liquidator. In our view, distinction has to be made between the R and M appointed by a secured creditor and one appointed by the company. In the case of the R and M appointed by a secured creditor I as here, his prime duty was to the debenture holder, and not to the company as stated by Jenkin LJ in *Re B Johnson & Co (Builders), Ltd* [1955] 2 All ER 775 at p 790:

> ... the phrase 'manager of the company', prima facie, according to the ordinary meaning of the words, connotes a person holding, whether de jure or de facto, a post in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit; whereas a receiver and manager for debenture-holders is a person appointed by the debenture-holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture and as a condition of obtaining the loan, to enable him to preserve and realize the assets comprised in the security for the benefit of the debenture-holders. The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and management pending sale, and with full discretion as to the exercise and mode of exercising those powers. *The primary duty of the receiver is to the debenture-holders and not to the company.* He is receiver and manager of the property of the company for the debenture-holders, not manager of the company. ... The whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers. ... He is under no obligations to carry on the company's business at the expense of the debenture-holders. Therefore he commits no breach of duty to the company by refusing to do so, even though his discontinuance of the business may be detrimental from the company's point of view. (Emphasis added.)

which passage was cited with approval in Privy Council case of *Downsview Nominees Ltd and another v First City Corp Ltd and another* [1993] 3 All ER 626.

With regard to s 233(1) and s 277(5), they state:

> Section 233(1). Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or *appears to be entitled.* (Emphasis added.)
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> Section 277(5). The court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator or provisional liquidator forthwith or within such time as the court directs any money, property, books and papers in his hands to which the company is *prima facie entitled.* (Emphasis added.)

It is settled law that movable assets which form the subject matter of a debenture are recognized as equitable charge (see *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in Liquidation)* [1995] 2 MLJ 600; *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266). Both cases were not considered in *Kimlin.*

The question which arises is, is the liquidator prima facie entitled to the movable asset in the present case pursuant to s 233(1) and s 277(5)? In the light of *Director of Customs, Federal Territory* and *Mahadevan*, our view is that the company is not prima facie entitled to the moveable asset.

It is common ground that the debenture in the present case was registered under s 108 of the Companies Act 1965, meaning that the first respondent as debenture holder was a charger of equitable charge.

A Assuming KCL was not in liquidation, it is incumbent upon KCL to redeem it before the R and M could be compelled to hand over the movable asset to KCL. Thus, turning to the present case, why should the liquidator's right be greater than that of KCL? In the light of our finding in para 13 herein, the R and M could not be compelled to hand over the movable asset to the liquidator. KCL is only entitled to the equity of redemption and it B follows, therefore, that the liquidator is only entitled to exercise his right of redemption.

On proof of debts, s 247(1) of the Act empowers the court to fix dates by which creditors are to prove their debts, but by s 252 this duty has been delegated to the liquidator. No leave is required to fix the dates or to send C out notices to prove.

A secured creditor is not obliged to submit proof of debt and can rely on his security by virtue of s 291(1) and (2) of the Act and sch C (s 42) of the Bankruptcy Act 1967. The combined effect of the above provisions is that a secured creditor may submit proof of debt and if he does, he will be entitled to a dividend in respect of the unsecured portion: (see items 9, 10 D and 11 of sch C). If the secured creditor does not submit proof of debt then pursuant to item 16 of sch C of the Bankruptcy Act 1967 the secured creditor shall be excluded from participating in a dividend.

The Federal Court in *Director of Customs, Federal Territory* considered the position of a secured creditor in a winding up and concluded that the E secured creditor stands outside the liquidation but may come in under the liquidation. There is clearly no mandatory requirement under s 291(1) and (2) for a secured creditor to come under a winding up and prove his debt.

In conclusion, for reasons given herein, our finding on the aforesaid issue is in the negative. Thus, we agree with the finding of the learned judge in the court below but for different reasons. Accordingly, we dismiss the F appeal with cost here and the court below. Further, as agreed by both respondents, we order that costs to the respondents to be paid out of the assets of the company. Deposit made by the appellant to be paid to the respondents towards the account of taxed costs.

Appeal dismissed with costs here and the court below. G

Reported by Chew Phye Ken

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